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METRO LUXURY SDN BHD v. PKNS ENGINEERING & CONSTRUCTION BHD

COURT OF APPEAL, PUTRAJAYA
HAMID SULTAN ABU BACKER JCA
BADARIAH SAHAMID JCA
B MARY LIM JCA
[CIVIL APPEAL NO: B-02(W)-418-03-2017]
17 MAY 2018

C ***CONTRACT:*** *Guarantee – Banker's guarantee – Demand for payment – Terms of performance bond – Whether bank guarantee unconditional and 'on demand' – Whether demand sufficient to trigger payment – Whether 'on demand' guarantee independent of underlying contract – Validity of demand – Liability under bank guarantee*

D ***CONTRACT:*** *Termination – Validity – Whether termination valid – Whether appellant failed to complete works within stipulated time*

The respondent was awarded certain works by Perbadanan Kemajuan Negeri Selangor ('PKNS'). The respondent awarded those same works to the appellant, namely a contract to design, build and complete 1160 units of six-
E storey flats for the sum of RM23,470,111.10. The said works were required to be completed within 24 months. Under the terms of an original contract, the appellant was required to provide a performance bond in the form of a bank guarantee for the sum of RM1,173,505.55, equivalent to 5% of the value of the said works ('performance bond'). Subsequently, the scope of the
F said works were amended and varied. Instead of building 1160 units, the appellant was now required to build 1560 units consisting of 560 low cost six-storey flats valued at RM29,994.06 each. The value of the contract works was consequently increased to RM43,953,992.80 and the completion period extended to 30 June 2000. The appellant was similarly required to provide a performance bond, valid until 30 June 2000. The respondent referred to
G this as the 'amended contract.' In the course of the said works and varied works, the appellant was granted five extensions of time. By a letter dated 21 September 2001, the respondent called upon the performance bond to be paid with immediate effect for the reason, *inter alia*, the appellant failed to complete the works within the stipulated time. On 16 November 2001, the
H respondent issued a certificate of non-completion wherein it was reiterated that the date of completion under the contract was 31 October 2001. The certificate of non-completion imposed liquidated ascertained damages of RM5,000 per day under cl. 41 for delays in the completion of the works. Thereafter, the respondent informed the appellant that the original contract
I and the amended contract were terminated as of 10 January 2001. The appellant challenged the termination as wrongful. The appellant thus

claimed, *inter alia,* for (i) a declaration that the termination was wrongful; (ii) that the sum paid up under the performance bond be refunded; (iii) that the retention sum be paid; and (iv) that the respondent pay the sum of RM1,940,612.10 for the variation works. On the other hand, the respondent claimed although the works were finally completed on 31 January 2003, it suffered losses as a result of the appellant's breaches. Thus, the respondent counterclaimed. The High Court Judge ('the HCJ') dismissed the appellant's claim and allowed the respondent's counterclaim. Hence, the present appeal.

Held (allowing appeal with costs)
Per Mary Lim JCA delivering the judgment of the court:

(1) Having examined the terms and conditions of the original contract, the amended contract and the main contract, there were no provisions entitling the respondent to call on the performance bond by reason of the appellant's failure to renew that performance bond. The requirement for the appellant to provide a performance bond which was to expire upon the end of the defect liability period or upon a bank guarantee being given for the construction warranty, the latter not being the contended case of the respondent, was already met at the outset of the contract. It was a condition precedent which had long been fulfilled. (para 42)

(2) The grant of numerous time extensions to complete the works was not in itself a reason to call on any performance bond. At the time of the call on the performance bond, which was by letter dated 21 September 2001, the date of completion had yet to lapse. The respondent's right to call on the performance bond had therefore not arisen at the time the call was made. The call was consequently invalid. (paras 44 & 48)

(3) On the basis that the mistake of the date in the letter of termination was typographical, as pleaded, it was reasonable to expect the respondent to have taken concerted steps to call the two makers of the letter to testify. They were not called. Instead, the person who drafted the letter testified that it was his mistake. This were both erroneous and insufficient. (para 54)

(4) Accepting the respondent's case that there was a mistake, that the date of termination was intended to be 30 October 2001, the date of termination was still invalid. This was because the fifth extension of time was in place with the date for completion fixed at 31 October 2001. The respondent was not entitled to terminate until the completion date had lapsed. It only lapsed on 31 October 2001. Consequently, the termination on 30 October 2001 was invalid. (para 59)

(5) The appellant was entitled to payment for work done. In the matter of direct payments to its sub-contractors, it was quite clear that the appellant had agreed to such direct payments under the terms of contract. Consequently, the respondent was entitled to make deductions for such payments from the payments due to the appellant. (para 61)

(6) Since the termination was wrongful and invalid, the respondent was therefore not entitled to impose liquidated ascertained damages. The works had since been fully completed on 31 October 2001. The defects liability period of 12 months after the certificate of practical completion had been issued had long since passed in which case, the appellant was entitled to the release of the full retention sum. (para 62)

Bahasa Malaysia *Headnotes*

Responden telah diawardkan kerja-kerja oleh Perbadanan Kemajuan Negeri Selangor ('PKNS'). Responden memberikan kerja-kerja tersebut kepada perayu, iaitu kontrak untuk mereka bentuk, membina dan menyiapkan 1160 unit flat enam tingkat untuk jumlah RM23,470,111.10. Kerja-kerja tersebut dikehendaki selesai dalam masa 24 bulan. Bawah terma kontrak asal, perayu dikehendaki menyediakan bon pelaksanaan dalam bentuk jaminan bank untuk jumlah RM1,173,505.55, bersamaan dengan 5% nilai kerja tersebut ('bon pelaksanaan'). Seterusnya, skop kerja-kerja tersebut dipinda dan diubah. Daripada membina 1160 unit, perayu kini dikehendaki membina 1560 unit yang terdiri daripada 560 flat enam tingkat kos rendah bernilai RM29,994.06 setiap satu. Nilai kerja-kerja kontrak seterusnya meningkat kepada RM43,953,992.80 dan tempoh penyelesaiannya dilanjutkan sehingga 30 Jun 2000. Perayu juga dikehendaki menyediakan bon pelaksanaan, yang sah sehingga 30 Jun 2000. Responden merujuk ini sebagai 'kontrak pindaan'. Dalam melakukan kerja-kerja tersebut dan kerja-kerja terpinda, perayu diberikan lima lanjutan masa. Melalui surat bertarikh 21 September 2001, responden memanggil bon pelaksanaan yang harus dibayar dengan serta-merta atas sebab, antara lain, bahawa perayu gagal menyiapkan kerja-kerja dalam masa yang ditetapkan. Pada 16 November 2001, responden mengeluarkan sijil gagal menyiapkan kerja di mana diulangi bahawa tarikh siap bawah kontrak itu adalah 31 Oktober 2001. Sijil gagal menyiapkan kerja tersebut mengenakan ganti rugi likuidasi sebanyak RM5,000 sehari bawah kl. 41 untuk kelewatan dalam menyelesaikan kerja-kerja tersebut. Kemudiannya, responden memaklumkan perayu bahawa kontrak asal dan kontrak pindaan ditamatkan pada 10 Januari 2001. Perayu mencabar penamatan tersebut sebagai salah. Perayu oleh itu, menuntut, antara lain, untuk (i) perisytiharan bahawa penamatan tersebut adalah salah; (ii) bahawa jumlah yang dibayar bawah bon pelaksanaan dikembalikan; (iii) bahawa jumlah tahanan dibayar; dan (iv) bahawa responden membayar jumlah sebanyak RM1,940,612.10 untuk kerja-kerja variasi. Sebaliknya, responden

mendakwa walaupun kerja-kerja akhirnya selesai pada 31 Januari 2003, ia mengalami kerugian akibat kemungkiran perayu. Oleh itu, responden menuntut balas. Hakim Mahkamah Tinggi ('HMT') menolak tuntutan perayu dan membenarkan tuntutan balas responden. Oleh itu, rayuan ini.

Diputuskan (membenarkan rayuan dengan kos)
Oleh Mary Lim HMR menyampaikan penghakiman mahkamah:

(1) Setelah memeriksa terma dan syarat kontrak asal, kontrak pindaan dan kontrak utama, tiada peruntukan yang membenarkan responden memanggil bon pelaksanaan atas alasan kegagalan perayu membaharui bon pelaksanaan. Keperluan untuk perayu menyediakan bon pelaksanaan yang akan tamat tempoh apabila berakhirnya tempoh liabiliti kerosakan atau apabila jaminan bank diberikan untuk jaminan pembinaan, yang kemudiannya bukan merupakan kes yang dipertikaikan oleh responden, telah pun dipenuhi pada permulaan kontrak. Ini adalah syarat yang telah lama dipenuhi.

(2) Pemberian lanjutan masa yang banyak untuk menyelesaikan kerja-kerja tersebut tidak semestinya menjadi sebab memanggil mana-mana bon pelaksanaan. Pada masa panggilan bon pelaksanaan, melalui surat bertarikh 21 September 2001, tarikh penyelesaian belum luput. Hak responden untuk memanggil bon pelaksanaan oleh itu tidak timbul pada masa panggilan dibuat. Panggilan tersebut tidak sah.

(3) Atas dasar kesilapan tarikh dalam surat penamatan adalah kesilapan menaip, seperti diplidkan, adalah wajar untuk mengharapkan responden mengambil langkah untuk memanggil kedua pembuat surat tersebut untuk memberi keterangan. Mereka tidak dipanggil. Sebaliknya, orang yang merangka surat tersebut memberi keterangan bahawa ia adalah kesilapannya. Ini adalah salah dan tidak mencukupi.

(4) Menerima kes responden bahawa terdapat kesilapan, bahawa tarikh penamatan yang dimaksudkan adalah 30 Oktober 2001, tarikh penamatan masih tidak sah. Ini adalah kerana pelanjutan masa kelima adalah bersamaan dengan tarikh siap pada 31 Oktober 2001. Responden tidak berhak untuk menamatkan sehingga tarikh penyempurnaan luput. Ini hanya tamat pada 31 Oktober 2001. Oleh itu, penamatan pada 30 Oktober 2001 adalah tidak sah.

(5) Perayu berhak menerima bayaran kerja. Dalam hal pembayaran langsung kepada subkontraktornya, cukup jelas bahawa perayu telah menyetujui pembayaran langsung tersebut di bawah syarat-syarat kontrak. Akibatnya, responden berhak membuat potongan untuk bayaran tersebut daripada pembayaran yang disebabkan oleh perayu.

(6) Oleh kerana penamatan tersebut adalah salah dan tidak sah, responden tidak berhak untuk mengenakan ganti rugi likuidasi. Kerja-kerja tersebut telah selesai sepenuhnya pada 31 Oktober 2001. Tempoh liabiliti kerosakan 12 bulan selepas sijil penyempurnaan praktikal yang dikeluarkan telah lama diluluskan dalam mana perayu berhak untuk mendapatkan bayaran jumlah tahanan.

Case(s) referred to:

Karya Lagenda Sdn Bhd v. Kejuruteraan Bintai Kidenko Sdn Bhd & Anor [2009] 2 CLJ 1 FC ***(refd)***

Langkawi R & D Academy Sdn Bhd v. Ketua Setiausaha, Kementerian Pertahanan Malaysia & Ors [2013] 3 CLJ 1006 CA ***(refd)***

For the appellant - Haniff Khatri & Bryan Teo; M/s Zul Rafique & Partners

For the respondent - Krishna Dallumah, Indran Kumaragu & Yong Yoong Hooi; M/s Krishna Dallumah, Manian & Indran

[Editor's note: Appeal from High Court, Shah Alam; Civil Suit No: MT1-22-244-2007 (overruled).]

Reported by Sandra Gabriel

JUDGMENT

Mary Lim JCA:

[1] The appellant's claim before the High Court was for loss suffered as a result of an unlawful termination of a contract to design, build and complete 1160 units of apartments at Section 7, Shah Alam, Selangor. The claim was dismissed while the respondent's counterclaim for costs for completion of the works together with liquidated and ascertained damages (LAD) of RM2,285,000 was allowed. Upon anxious consideration of the written and oral submissions, the grounds of decision and the records of appeal, we were compelled to intervene, finding that there were appealable errors of law and on the facts in the decision reached. These are our reasons in full.

Factual Background

[2] The respondent was awarded certain works by Perbadanan Kemajuan Negeri Selangor (PKNS). Pursuant to a letter of award and acceptance dated 15 February 1996, the respondent awarded those same works to the appellant, namely a contract to design, build and complete 1160 units of six-storey flats at Section 7, Shah Alam, Selangor (the said works) for the sum of RM23,470,111.10. The scope of works are as set out at cl. 1.2 where at cl. 1.2(e), it was agreed that the scope includes "All other Scope of Works as contained in the main contract between PKNS and PECB", the respondent.

[3] The said works were required to be completed within 24 months. The respondent refers to this as the "original contract." In short, the respondent is the "main contractor" while the appellant is the "main subcontractor"; this is affirmed at cl. 11.0 of the original contract. Further, at cl. 2.0, the parties agreed that this original contract "shall be based on a back to back agreement with the main contract between PECB and PKNS with respect to:

(a) the obligation and responsibilities of the main sub-contractor;

(b) the terms and conditions of this sub-contract;

(c) the specification, drawings and details shop-drawings for this subcontract work;

(d) the terms, mode, quantification, cost distribution and certification of progress payment for this subcontract; and

(e) provision of five years warranty for the construction system used for this project.

[4] Under the terms of this original contract, the appellant was required to provide a performance bond in the form of a bank guarantee for the sum of RM1,173,505.55, equivalent to 5% of the value of the said works (performance bond). This performance bond, which the appellant duly provided, would expire at the end of the defects liability period (DLP); the DLP being 12 months from the issue of the certificate of practical completion (CPC).

[5] By a letter dated 28 April 1999, the scope of the said works were amended and varied. Instead of building 1160 units, the appellant was now required to build 1560 units consisting of 560 low-cost six-storey flats valued at RM29,994.06 each (varied works). The value of the contract works was consequently increased to RM43,953,992.80 and the completion period extended to 30 June 2000. The appellant was similarly required to provide a performance bond, valid to 30 June 2000. The respondent referred to this as the "amended contract."

[6] The appellant appointed Jastac Sdn Bhd as its subcontractor to carry out the said works, including the varied works. It is not in dispute that the contractual arrangements between the parties here were understood by them to be on a back to back with the contract between the respondent and PKNS.

[7] Pursuant to cl. 7 of the original contract, the respondent was entitled to make direct payments to the appellant's subcontractors and suppliers if the appellant fails to pay them. Similarly, PKNS may do the same where either the appellant or the respondent fails to pay the subcontractors or suppliers.

[8] In the course of the said works and varied works, the appellant was granted five extensions of time (EOTs) as follows:

(i) EOT1 1 March 1998 to 14 December 1996

(ii) EOT2 13 December 1998 to 30 June 2000

(iii) EOT3 1 April 2000 to 12 February 2001

(iv) EOT4 14 February 2001 to 30 June 2001

(v) EOT5 1 July 2001 to 31 October 2001

[9] By letter dated 21 September 2001, the respondent called upon the performance bond to be paid with immediate effect. The respondent cited two reasons for the call:

(i) that the appellant had failed to re-extend the BG despite the respondent's request conveyed in its letter of 8 June 2001;

(ii) that the appellant failed to complete the works within the stipulated time despite numerous time extensions.

[10] Arab-Malaysian Bank, which had provided the BG, released the full sum under the performance bond to the respondent on 2 October 2001. On 3 October 2001, the bank informed the appellant that the proceeds had been collected by the respondent on even date.

[11] On 16 November 2001, the respondent issued a certificate of non-completion wherein it was reiterated that the date of completion under cl. 44 of the conditions of contract was 31 October 2001. The CNC imposed LAD of RM5,000 per day under cl. 41 for delays in the completion of the works.

[12] By letter dated 25 July 2002, the respondent informed the appellant that the original contract and the amended contract were terminated as of 10 January 2001. The appellant was required to "remove your workers, rented plant/machineries and all equipment and to vacate the site on or before 30 July 2002, failing which we shall lodge a police report and remove the same at your risk and further to claim from your good-office any expenses incurred." The letter was signed by Low Siew Moi (financial advisor) and Hj Mohd Sufian Hj Hashim (General Manager). Low was actually the Deputy General Manager of PKNS, the employer – see p. 39 CBD.

[13] On 7 March 2003, CPC was issued stating that the works had been practically completed on 31 January 2003.

[14] The appellant challenged the termination as wrongful contending that: A

(i) the termination was against the terms of both the original contract and the amended contract;

(ii) the appellant had achieved 98% completion at the time of the termination; B

(iii) the respondent had failed to abide by the payment terms under both contracts;

(iv) there were variation works instructed by the respondent and PKNS;

(v) the uplifting of the performance bond was wrongful; C

(vi) the appellant had been given extensions of time to complete the works which time had not elapsed at the time of issuance of the letter of termination.

[15] The appellant's claim was *inter alia* for the following: D

(i) a declaration that the termination was wrongful;

(ii) that the sum paid up under the performance bond be refunded;

(iii) that the retention sum be paid;

(iv) that the respondent pays the amounts due under certificates 30 to 40 amounting to the sum of RM3,702,063.87; E

(v) that the respondent pays the sum of RM1,940,612.10 for the variation works.

[16] In defence, the respondent alleged that the termination was valid for F the following reasons. First, the appellant had failed to extend the performance bond despite the respondent's request conveyed in letter dated 8 June 2001. This left the respondent with no option but to exercise the call on 21 September 2001 as the performance bond was expiring on 30 September 2001. Second, the respondent claimed that the appellant was G in delay insofar as the works were concerned, that as of 30 June 2001, the said works had only achieved 96.33% completion.

[17] Next, the respondent claimed that in July 2001, PKNS stopped paying them. On 26 September 2001, PKNS warned the respondent of its delay and informed that it will henceforth deal directly with the subcontractors and H suppliers including make direct payments to them.

[18] As for the date of termination, the respondent claimed that it was mistakenly written as 10 January 2001 when it should read 30 October 2001. In essence, the respondent claimed that it was the appellant who was in breach, that the appellant had been paid for the variation works, that there I

was no issue of outstanding payments as the respondent had paid the subcontractors and suppliers directly, that there was insufficient retention sum to pay for any remedial work that may have to be done upon expiry of the defects liability period (DLP).

[19] For all these reasons, the respondent terminated both contracts and appointed Asal Bina Sdn Bhd to complete the works for RM0.894 million. The respondent claimed that although the works were finally completed on 31 January 2003, it suffered loss as a result of the appellant's breaches. The respondent counterclaimed for the following:

(i) costs for completion of the project – RM2,478,426.96; and

(ii) LAD from 1 November 2001 to 31 October 2003 totaling RM2,285,000

Decision Of The High Court

[20] The learned High Court Judge found that the claim on the performance bond or the BG was valid on the basis that it was an on-demand bond independent of the underlying contract where the court will not inquire into any breach of that underlying contract.

[21] While accepting that the failure to extend the BG was not a valid consideration as the purpose of the BG was to ensure performance of the contract, the learned judge nevertheless found it proper for the respondent to call on the BG as it was about to expire on 30 June 2001 and "as per the first LA it has to be valid upon the end of the DLP and that the plaintiff was asked to extend BG until 30 September 2001." The learned judge found that the appellant's failure to extend the BG "amounts to a breach." Since the respondent's request for the extension of the bond was not forthcoming from the appellant, the "call on the BG was in order. This was especially so when any claim on BG had to be made by 30 September 2001."

[22] The learned judge rejected the appellant's contention that the BG could not be extended because there was no official EOT as this was not explained to the respondent. Besides there being no document from the bank that it required a letter to confirm EOT, this issue was also not pleaded.

[23] The learned judge also rejected the appellant's claim that it could complete the balance 2.2% of the works as there were about 40 days from the call on 21 September 2001 to 31 October 2001, the expected date of the completion of the works. The learned judge examined the evidence and found that the progress reports for 1 June 2011 to 15 June 2011 showed progress to be of 96.33% and delay to be 3.76% and for the period 1 September 2001 to 20 September 2001 to be 97.71% and 2.05% respectively. According to the learned judge, this "effectively meant that over a period of four months, the work progress was less than 1.4%" and that overall, "this meant work had not been completed despite the EOT given."

[24] As for the termination, the learned judge first of all, accepted that the date of 10 January 2001 stated in the respondent's letter of termination dated 25 July 2002 was a mistake and that it ought to read 30 October 2001. The learned judge accepted the explanation of Ahmad Pauzi bin Md Nor (DW2), the respondent's Deputy Contracts Manager at the material time and who prepared the termination letter which was later signed by Low Siew Moi (Financial Advisor) and Hj Mohd Sufian Hj Hashim (General Manager). Neither Low nor Hj Mohd Sufian was called to testify.

[25] As for the question of lawfulness of the termination on the ground of failure to proceed with the works regularly and diligently, the learned judge answered in the affirmative. It was the learned judge's view that the failure to issue a notice of default under cl. 50.1 was not fatal given that cl. 50.1 only provides that such a notice "may" be issued. The evidence in any case, showed:

(i) that the appellant was aware of the default of delay;

(ii) that the appellant's witness, PW1 had agreed with the contents of the letter of 7 June 1999 which showed progress of works was slow, standing at 20.32% as compared to the agreed work progress of 40.16%;

(iii) that such delay had "widened";

(iv) that the appellant had not responded to say that there was no delay;

(v) that there was no evidence of payment until 25 July 2001;

(vi) at best, there were only workers at site and the letter asked the appellant to remove the workers, plant and/or machinery from site.

[26] The learned judge further made a finding on the issue of direct payments to the appellant's subcontractors; that such payments were validly done. The appellant had complained that such payments were wrongful for want of its consent. The learned judge found that it was not necessary to procure prior consent from the appellant as the appellant had already agreed to such terms – see cl. 7 of the amended contract.

[27] On the issue of release of the retention sum, the learned judge found that since there was no completion of works by the appellant, the appellant was not entitled to such release under cl. 48.5.1.2.

[28] The learned judge finally found that there were no monies due after deductions for the reasons given by the respondent.

A **Decision Of This Court**

[29] The first issue concerns the call on the performance bond. As pointed out earlier, the learned judge disagreed with the appellant and ruled that the call was lawful. With respect, we disagree.

B **[30]** The learned judge had addressed the issue from the character of the performance bond, finding that it was an on-demand bond in which case, relying on the Federal Court decision in *Karya Lagenda Sdn Bhd v. Kejuruteraan Bintai Kidenko Sdn Bhd & Anor* [2009] 2 CLJ 1; [2008] 6 MLJ 636, the reasons for the call are irrelevant. It was the learned judge's view that "on the face of it, the call on the BG by defendant and the payment to it was valid." The learned judge next, quite correctly, proceeded to examine the merits for the call, whether the respondent was justified in making that call. We say that the learned judge was correct in taking that exercise as the issue of the performance bond or the BG being in the nature of an on-demand bond is really immaterial in the consideration of the validity of the call between the contracting parties. That issue is relevant where it concerns the issuing bank and the respondent, the law being that non-contracting parties should not be required to examine the reasons for the call, that such obligations for instance, will impede the commerciality of BGs.

E **[31]** Where the issue is raised in a dispute between the contracting parties, the court is obliged to examine the reasons relied on for the call. In this case, the respondent has cited the non-extension of the BG and the non-completion of the works despite numerous time extensions.

[32] According to the terms of the first letter of award or the original contract, the provision of the performance bond was a condition precedent. Clause 1.1(a) of the original contract reads as follows:

> 1.1 The following conditions shall serve as a **conditional precedence** to this Award:
>
> a) To provide a Performance Bond in the form of a Bank Guarantee or an approved insurance Guarantee for an amount of RM1,173,505.55 (being 5% of the Contract Sum). This guarantee shall expire upon end of defect liability period or upon furnishing to us a Bank Guarantee for the construction system warranty as per clause 2.0(e) below, whichever is the later.
>
> b) Prior to the ...
>
> c) You are required to fulfill the requirements of the above conditions by 15th June 1996. Where you fail to comply accordingly, we reserved the right to withdraw the award of this project from you and all cost to be incurred by us out of this events shall be charged and *(sic)* borned by you. (emphasis added)

[33] Since the arrangements between the parties were on back to back terms with the main contract, the contract under which the respondent was awarded the project works by the employer, PKNS, the terms and conditions of the main contract, in particular cls. 38 and 43.6 must be given proper regard when dealing with the issue of the validity of the call. There are also no specific provisions on the matter of the performance bond, whether under the original contract or the amended contract.

[34] Clause 38 of the main contract deals with performance bonds:

> 38.1 The Contractor shall provide Performance Bond Guarantee of a bank operating in Malaysia to the Government in a sum equal to the amount as specified in Appendix 1 for the due performance of the Contract.
>
> 38.2 The Bank and the terms of the Bond shall be such as shall be approved by the Government, and the cost of obtaining the Bond shall be at the expense of the Contractor and shall be included in the Contract Price.
>
> 38.3 The original of the Bond shall be deposited with the Government as a condition precedent to the Commencement of the Works, and shall remain with the Government and be valid until six (6) months after the issue of the certificate of Practical Completion for the whole of the Works under clause 40.

[35] Clause 43.6 specifically provides:

> 43.6 Nothing contained in Clauses 43.1 to 43.5 shall entitle the Contractor to the release of the Performance Bond or any part thereof deposited by him under clause 38, the intention being that the said Performance Bond or any part thereof shall be released or refunded only 6 months after the issue of the Certificate of Practical Completion of the whole of the Works under Clause 40.

[36] Having examined the terms of the main contract and reading it together with the terms and conditions of the original contract and the amended contract, we are of the view that the performance bond was intended to secure due performance of the works. The provision of the performance bond itself was a condition precedent to the award of the contract works to the appellant. Once that was fulfilled, once the performance bond was provided in the terms required under the cl. 1.1 of the original contract, the application of the performance bond itself was dependent on the substantive terms of the original contract, the amended contract and the main contract.

[37] The facts in this appeal are entirely different from those in *Langkawi R & D Academy Sdn Bhd v. Ketua Setiausaha, Kementerian Pertahanan Malaysia & Ors* [2013] 3 CLJ 1006; [2012] 5 MLJ 662. In that case, the performance bond was required to be delivered by a certain date failing which the

respondent there was entitled to terminate the contract and consider themselves discharged from further performance of the contract. These are far from the facts presented in this appeal.

[38] The performance bond is intended to ensure that the appellant carries out its end of the bargain which is the due performance of the works under the contract. It is to ensure not just any performance but due performance of the works. That is to say, that the appellant duly performs the whole contract until full completion, and not just partially. Hence, a stipulation on the validity period of the performance bond.

[39] And, in this regard, cl. 43.6 is relevant. Clause 43.6 provides that the appellant is not entitled to the release of the performance bond or any part thereof notwithstanding partial occupation or possession of the works by the employer. In such circumstances, certificates of partial occupation may be issued where there are implications on the defect liability period, the certificate for making good defects, and reduction in any LAD imposed. Clause 43.6 provides that notwithstanding this partial occupation, the appellant as the contractor, is still not entitled to the release of the performance bond as the intention to release or refund it only six months after the issue of the certificate of practical completion for the whole of the works under cl. 40. In the absence of any express provision to the contrary, and there is none, this clause must be read to implicitly apply to the respondent. The respondent too, cannot utilise or ask for the release of the performance bond at any earlier time.

[40] The exception to this would be where there has been no due performance of the works. This would be where the appellant has not completed the works by the completion date.

[41] Under cl. 2.1 of the main contract, the appellant was obliged to "complete the design of the works and carry out and complete the works in strict accordance with the contract documents." Under cl. 40.1, the appellant has agreed to "complete the whole of the works on or before the date for completion stated in Appendix 1 or such extended time as may be allowed under cl. 44." The parties had further agreed that where there has been non-completion of the works by the date of completion or such extended time, and there is proper certification by the project director, the respondent is allowed to impose LAD for the period when the works remain uncompleted – see cl. 41.

[42] Having examined the terms and conditions of the original contract, the amended contract and the main contract, we do not see any provision entitling the respondent to call on the performance bond by reason of the appellant's failure to renew that performance bond. The requirement for the

appellant to provide a performance bond which is to expire upon end of the DLP or upon a BG being given for the construction warranty, the latter not being the contended case of the respondent, was already met at the outset of the contract. It was a condition precedent which has long been fulfilled.

[43] As for the second reason relied on by the respondent, that there was non-completion despite the numerous time extensions, this was not examined by the learned judge.

[44] To begin with, the grant of numerous time extensions to complete the works is not in itself a reason to call on any performance bond. We find that most unusual unless of course, the parties have specifically agreed to such terms as part of the condition for grant of extension of time. There is no agreement to this effect on the facts of this case thus rendering the call for this reason, wrong and the call, invalid.

[45] Similarly, the respondent's call on the performance bond because the bond was about to expire is not a valid reason at all for the call. The circumstances giving rise to a right to call on the bond is only when there is non-performance of the works. Calling because the bond is about to expire cannot, by any stretch of argument, fall within that understanding. The call for that reason is again, consequently, invalid.

[46] The respondent is entitled to call upon the performance bond if it can be shown that the appellant has failed to meet its obligation of due performance of the works. This means the call is valid if it can be shown that the appellant failed to complete the works by the agreed date of completion.

[47] The parties had provided in cl. 44 for the matter of delays and extensions of time for completion. The mechanics and considerations that operate in such circumstances are of no concern in this appeal. What is undisputed in this appeal is that there were five extensions of time in respect of the date of completion with EOT 5 expiring on 31 October 2001. By such extension, the date for completion of the works is now fixed at 31 October 2001.

[48] According to the evidence presented before the learned judge, 2.2% of the works remained outstanding for completion. The appellant argued that it was capable of completing that 2.2% within the balance period of 40 days. More materially, at the time of the call on the performance bond, which is by letter dated 21 September 2001, the date of completion had yet to lapse. The respondent's right to call on the performance bond had therefore not arisen at the time the call was made. The call was consequently invalid.

[49] The next matter concerns the unlawful termination.

[50] By letter dated 25 July 2002, the respondent terminated the services of the appellant stating as follows:

> Determination of services
>
> On 10th January 2001 by conduct and intention of your good office that your good office is unable to carry out the commitments under the construction agreements and further your good office have consented to direct payment from our company to your sub-contractors.
>
> We wish to inform your good office that your construction agreement dated 15th February 1996 was determined on 10th January 2001 and you shall remove your workers, rented plant/machineries and all equipment and to vacate the site on or before 30th July 2002 ...

[51] The appellant's case is that the termination with effect from 10 January 2001 is unlawful as at that date, the date for completion had already been extended to 31 October 2001. The respondent's response was that the date of 10 January 2001 was in error; the correct date being 31 October 2001.

[52] We note that at paras. 25, 26 and 27 of the defence, it is pleaded that EOT 5 extended the date for completion to 30 January 2001; that the date of termination is 30 October 2001 and not 10 January 2001; and that the error is typographical.

[53] Accepting that this was a genuine typographical mistake, it ought to have been explained away or clarified at the material time of exchange of correspondence, not left as a response in the pleadings, and unexplained at the trial.

[54] On the basis that the mistake of the date in the letter of termination was typographical, as pleaded, it would be reasonable to expect the respondent to have taken concerted steps to call the two makers of the letter to testify. They were not called. Instead, the person who drafted the letter testified that it was his mistake. In our view, that is both erroneous and insufficient. The signatories of the letter must be called to explain away the "typographical" mistake which appears not once but twice in the letter of termination. In law, they are the rightful makers of the letter, not the drafter. They should explain whether they were aware of the mistake at the material time, and why they nevertheless signed the letter.

[55] We are further of the view that the defence of typographical mistake is not at all plausible. The letter written on 25 July 2002 refers to a decision taken at a meeting on 26 June 2002. That decision is on the "course of action to be taken." The letter specifically refers to the appellant's past conduct and intention as evinced on "10 January 2001", that the appellant's "good-office is unable to carry out the commitments under the construction agreement and

further, your good-office have consented to direct payments from our company to your sub-contractors." With the appellant's "past conduct and intention", the letter then moves on to inform the appellant that the agreement "was determined on 10 January 2001". With that determination, the appellant is required to remove its workers, rented plant, machinery, equipment and the like "on or before 30 July 2002" failing which the respondent would do so.

[56] From the contents of the letter, the respondent's plea of a typographical mistake, whether in one or both mentions of the date "10 January 2001" and that the date intended was "30 October 2001" is untenable and quite illogical. There may be an error in the date in that the event may have been on a different date, but that is still far from being a typographical mistake. The date, in our view, is specific and deliberate and requires the two signatories to explain whether some other date was intended.

[57] It is evidentially insufficient that the person who drafted the letter testifies. The two signatories must testify and explain why they signed such an important letter with this material error(s), whether they agree that the date(s) is erroneous, or whether they had some other different understanding altogether when they signed the termination letter. A letter of termination is undeniably a significant letter as it brings to an end a contractual relationship with all its attendant ramifications, to be carefully considered before the decision on the course to be taken is made. The errors here are material, not just in the date but whether the event that is cited in fact occurred. Such a termination letter must be carefully considered before it is signed and conveyed to the appellant. We therefore, find that the learned judge fell into error in accepting the evidence of DW2.

[58] With the termination taking effect as of 10 January 2001, the termination by the respondent is clearly invalid. At the material time, EOT 3 with the date for completion fixed at 12 February 2001 was in effect. The respondent had therefore no right to terminate for reasons of non-completion.

[59] Accepting the respondent's case that there was a mistake, that the date of termination was intended to be 30 October 2001, the date of termination is still invalid. This is because EOT 5 was in place with the date for completion fixed at 31 October 2001. The respondent was not entitled to terminate until the completion date had lapsed. It only lapsed on 31 October 2001. Consequently, the termination on 30 October 2001 is invalid.

[60] We further agree with the submissions of the appellant that the learned judge was erroneous in allowing the respondent to rely on its earlier notice of delay dated 17 January 2001. Following this notice, the respondent

granted two EOTs, EOT 4 and EOT 5. Under cl. 44, extensions of time may be granted where the reasons for the delay fall within the accepted reasons set out in cl. 44 itself. Having accepted the reasons for the delay, and having granted two EOTs since that notice of delay on 17 January 2001, the respondent is not entitled to turn now to that notice, and rely on it to justify its decision to terminate. The respondent could well have invoked its rights under cl. 41 and imposed LAD for non-completion. It did not and instead chose to grant extensions. For all these reasons, the termination was invalid and it was plainly erroneous for the learned judge to have concluded otherwise.

[61] On the question of payments due to the appellant, we find that the appellant is entitled to payment for work done. Such work has been properly certified and the appellant must be paid. In the matter of direct payments to its sub-contractors, it is quite clear that the appellant had agreed to such direct payments under the terms of contract. Consequently, the respondent was entitled to make deductions for such payments from the payments due to the appellant.

[62] Given our deliberations on the question of termination, that it is wrongful and invalid, the respondent is therefore not entitled to impose LAD. The works have since been fully completed on 31 January 2003 with the certificate of practical completion issued on 7 March 2003 confirming that completion. The defects liability period of 12 months after the CPC has been issued has long since passed in which case, the appellant is entitled to release of the full retention sum.

[63] Under cl. 48.5.1, the retention sum is intended to be used for rectification work during the DLP. The sum is retained and released to the appellant after the certificate of making good defects has been issued – see cl. 48.5.12. However, where the termination is wrongful and the appellant has not had an opportunity to address any defective work, it would not be proper for the respondent to retain the full retention sum for the purpose of such remedial work. More so when the respondent's counterclaim is addressed. The appellant is therefore entitled to the return of its retention sum as pleaded at para. 15(b)(ii).

[64] The respondent had also counterclaimed for loss suffered as a result of engaging Asal Bina Sdn Bhd, a third contractor, to complete the remaining works of the appellant. The respondent had counterclaimed a sum of RM2,478,426.96 for this purpose. The evidence adduced showed that there was 2.21% of work yet to be completed as at 31 October 2001, the date for completion under EOT 5. From the respondent's own pleaded defence at para. 20, that it had engaged Asal Bina to complete the works for the sum of RM0.894 million, the respondent's counterclaim for RM2,478,426.96 is unsustainable.

[65] For the reasons discussed above, we find, unanimously, that the learned judge had plainly erred. There are merits in this appeal for which appellate intervention is warranted. The termination by the respondent is evidently wrong in law and on the facts. Consequently, the call on the bond as well as the forfeiture of the retention sum are unlawful.

[66] The appeal is therefore allowed. We set aside the decision of the learned judge and ordered prayers as per para. 15(b)(i) and (ii) with interest at the rate of 5% per annum from the date of filing of the writ to the date of realisation. We further ordered costs of RM70,000 for here and below, such costs are subject to the payment of allocator fee. Lastly, we ordered that the deposit be refunded.